

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**FEBRUARY 28, 2008
MORNING PAPER
QUESTIONS**

ESSAY SECTION

1. Debbie, a successful trial attorney and partner at Law Firm, met Mel, who was the owner of a profitable biotechnology company located in Boston, Massachusetts. Mel owned several properties in Manhattan and on Nantucket and an apartment in Paris. After a brief courtship, Mel and Debbie married while in Paris. Prior to their marriage, Mel and Debbie had executed a valid prenuptial agreement that provided that in the event of a divorce, alimony would be \$2,000 per month. Debbie and Mel then purchased a home in Boston and had twin boys.

Mel insisted that Debbie give up her law practice to stay home with the children. Mel traveled frequently for his job. Mel lived a lavish lifestyle owning several antique cars, collecting rare works of art and joining several exclusive clubs. However, despite his wealth, Mel kept Debbie on a tight budget with no disposable income to spend on herself. Debbie did not share Mel's lifestyle. Mel controlled his family's expenses.

After devoting herself to her family, Debbie missed her professional life as a trial attorney, considered returning to practice, and had discussions with Law Firm about returning, but Debbie abandoned these discussions when Mel did not approve. Debbie became increasingly depressed and bitter, and she began drinking alcohol heavily. Debbie's relationship with Mel and her children became strained and deteriorated. Debbie became isolated from her children, friends and family.

Mel demanded a separation and moved to Florida. Debbie agreed. Debbie continued to live with the twins in the marital home, which had fallen into a state of physical disrepair. She became increasingly withdrawn, and dependant on prescription medications and alcohol. Debbie made no attempt to return to work and her use of drugs and alcohol continued, while Mel continued to expand his biotechnology business and his personal investments. Mel continued to enjoy his high standard of living while Debbie was destitute.

Several years after their separation, Debbie received notification that Mel had been granted a divorce in Florida. Mel then told Debbie that she could have the marital home, the alimony pursuant to the prenuptial agreement and nothing more. Mel informed her that the twins, who were now twelve years old, were relocating to Florida to live with him and his new

wife. Mel was concerned about the impact of Debbie's depression and drug dependency on the boys and he told her to stay out of their lives.

Debbie later learned that one of the products produced by Mel's company that had been in development for several years was approved by the Food and Drug Administration and became very profitable. Shortly thereafter, Mel sold the company for approximately one billion dollars more than he would have prior to the success of this product.

What are rights of the parties?

2. While skiing at Snow Peak, a ski area in Massachusetts, Andrew was seriously injured when the chairlift he was riding detached and fell 50 feet to the ground. Andrew incurred medical bills exceeding \$100,000. At the time of his injury, Andrew was a Massachusetts resident, but six months later he moved to New York, where he remained.

A. A year after his injury, Andrew commenced a civil action in the United States District Court for the District of Massachusetts against Ski, Inc., the owner of Snow Peak, alleging that his injuries were caused by the negligence of Ski, Inc. Ski, Inc. is a Delaware corporation with its principal place of business in Massachusetts. Ski, Inc. moved to dismiss Andrew's complaint.

B. Ski, Inc. brought third-party complaints against Chairlift Corp., the manufacturer of the chairlift, and Builder, the installer of the chairlift, alleging that they were liable to it for all or part of Andrew's claim and seeking indemnification from them for any judgment found against Ski, Inc. Chairlift Corp. is a Delaware corporation whose principal place of business is in New York. Builder is an individual who resides in Massachusetts. Both Chairlift Corp. and Builder moved to dismiss the third-party complaints filed by Ski, Inc.

C. In his answer to Ski, Inc.'s third-party complaint, Builder brought two (2) counterclaims against Ski, Inc., alleging that Ski, Inc. owed him \$30,000 for the construction of a first-aid hut and \$50,000 for the construction of a ski lodge, respectively, at Snow Peak. Ski, Inc. moved to dismiss both counterclaims.

D. Andrew amended his complaint against Ski, Inc. to add Chairlift Corp. and Builder as defendants, and to add claims alleging that his injuries also were caused by their negligence. Both Chairlift Corp. and Builder moved to dismiss the claims against them.

Assume that each of the above motions raised only the grounds of jurisdiction and/or venue under Rule 12(b) of the Federal Rules of Civil Procedure. How should the Court rule on each motion?

3 Developer obtained permission to construct a mixed use condominium community and filed a Master Deed which complied in all respects with Massachusetts law. Phase I, consisting of residential units, was completed in 2004 and Trustees were elected pursuant to the Master Deed requirements.

A. Amos bought two of the residential units with the intention of combining them and offering them for resale which was permitted by the Master Deed. He contracted with Supplier to provide the labor and materials he needed to combine the two units. On September 1, 2005, Supplier recorded a notice of the contract, specifying that the work was to be completed on or before December 1, 2005. On December 15, 2005, Amos sold the completed double unit to Buyer. On December 20, 2005, Supplier recorded a claim that \$75,000 had not been paid for labor and materials and identifying Amos as the owner. In January, 2006, Supplier filed a complaint in Superior Court against Amos and a month later recorded an attested copy of the complaint. Several months later, Supplier amended its complaint to add Buyer as a defendant. Buyer moved to dismiss Supplier's complaint.

B. Buyer's Neighbor, who had been away during the entire fall of 2005, told Buyer that the backyard patio added by Amos encroached on his property and demanded that Buyer remove it. Buyer refused and Neighbor complained to the Trustees who referred the matter to Lawyer. In early 2007, Lawyer reported that the patio as constructed was not permitted by the Master Deed. The Trustees ordered Buyer to remove the patio and, when Buyer refused, Neighbor sued Buyer in Superior Court and moved for an order directing the removal of the patio.

C. Unit 4 was owned by Debtor. Bank held a mortgage on Unit 4 and, as required, Debtor had obtained fire insurance on the property through Insurer, listing Debtor as the owner and Bank as the mortgagee. In mid-2005, Bank foreclosed on Unit 4 but Bank never notified Insurer that it had acquired the property through foreclosure. Shortly after Bank acquired Unit 4, there was a fire which substantially damaged the property. Bank filed a claim under the fire insurance policy obtained for Unit 4 by Debtor which was still in force and Insurer refused to pay. Bank sued Insurer demanding payment for the fire damage to Unit 4 and Insurer filed a motion for summary judgment.

D. The foreclosure deed for Unit 4 identified Bank's address as One Main Street, Town. Taxes had not been paid on the property since 2004. On May 15, 2006, Town recorded a tax taking and listed Bank as the "supposed subsequent owner" of Unit 4. On the same day, Town sent Bank a letter by regular mail that it intended to foreclose the right of redemption and that Bank had 45 days to respond. In July, 2006, Town filed a petition in Land Court to foreclose all redemption rights and, on October 23, 2006, Town sent a citation and notice of its foreclosure petition by certified mail to Bank at One Main Street, Town. At the time, Bank was undergoing extensive renovations and because of the construction, it was the practice of the United States Postal Service (USPS) to leave Bank's mail with workmen on the site. Bank was aware that USPS regularly left Bank's mail with workmen on the site. On the day that Town's certified letter arrived, Site Foreman, who was not Bank's employee, signed the USPS green return receipt which was then returned to Town by USPS. Town's certified letter was either lost or misplaced. No answer or appearance was filed in Land Court on Bank's behalf and on December 1, 2006, a decree barring all rights of redemption was entered. In December, 2007, Bank, having learned that Town had taken Unit 4 for unpaid taxes, filed a motion for relief from judgment in Land Court.

How should the relevant court rule on each of the four pending motions?

4. In the fall of 2007, Steve was a college freshman living in Massachusetts. Steve was born on January 15, 1990 and his parents lived in Florida.

A. Steve agreed in the fall of 2007 to pay Ann twenty dollars if Ann would wash Steve's car. Ann washed Steve's car, but Steve refused to pay Ann.

B. Best Pizza had a policy of allowing college students to pay for all of their pizza delivery orders at the end of the school's fall term in December 2007. Steve ordered and consumed four hundred dollars worth of pizza from Best Pizza in the fall term, but refused to pay the pizza bill from Best Pizza.

C. Steve hired Charles to tutor him for the fall term in biology for a total cost of one thousand dollars due on December 31, 2007. Before the first tutoring session in September 2007 Charles told Steve that he needed to know how old Steve was. In response, Steve lied and said "I currently am twenty years old." After the tutoring was complete, Steve refused to pay Charles for the tutoring sessions.

D. Steve was arrested in October 2007 for shoplifting and hired an attorney, Dale, to defend him in court. Steve and Dale agreed that Dale's legal fee for this defense would be a flat one thousand dollars due from Steve on December 31, 2007. Even though Dale succeeded in getting Steve's criminal charges dropped in December 2007, Steve only paid Dale three hundred dollars in late January 2008. At that time Steve told Dale that her legal services were worth three hundred dollars since Dale only spent a few hours working on the matter. In response, Dale threatened to complain about Steve's failure to pay her the remaining seven hundred dollars to the dean of the college and to the college's newspaper.

E. Steve fell on an icy sidewalk outside Eddie's house in November 2007. In December 2007, Eddie paid Steve five hundred dollars in exchange for Steve signing a general release of all of his possible claims against Eddie. In early February 2008, Steve wrote Eddie to tell him that the general release was invalid and that Eddie should pay him another thousand dollars to settle Steve's claims against Eddie from that fall. Steve also wrote Eddie that Steve would go to the local newspaper with the story of his injury on Eddie's sidewalk unless Eddie paid him the extra thousand dollars.

What are the rights of Steve, Ann, Best Pizza, Charles, Dale and Eddie?

5. Plaintiff was in an automobile accident with Defendant in which Plaintiff claimed Defendant failed to stop at a red light and hit her car. Defendant denied that he failed to stop at the red light. Plaintiff brought a civil action against the Defendant in Superior Court. The following occurred at trial:

A. Sue, Plaintiff's attorney, called a polygraph expert who will testify that Plaintiff passed a polygraph examination and that Plaintiff was an "honest and sincere" person. Jack, Defendant's counsel, objected to the proposed testimony.

B. Sue called Henry, a mechanical engineer, to testify that Plaintiff is suffering certain nerve related injuries which Henry called "Sudden Deceleration Syndrome" ("SDS"). Henry will testify that Plaintiff's nerve injuries were caused by the sudden deceleration of her car in the accident. Henry's diagnosis of SDS is based upon some clinical tests he performed and his observations of approximately 25 people who had similar type accidents. Jack objected to Henry's proposed testimony.

C. Sue called Anne, Defendant's former girlfriend, who will testify that she and Defendant were text messaging on their phones at the time of the accident and that she received a text message from Defendant shortly after the accident that stated "I didn't see the red light". Jack objected to Anne's proposed testimony.

D. Sue called Anne to testify also that, on several occasions prior to the accident involving Plaintiff, she had been a passenger in Defendant's car when Defendant had failed to stop at red lights. Jack objected to Anne's proposed testimony.

E. Sue called Officer Jones, the investigating police officer, to testify about his investigation of the accident. Officer Jones testified that he had difficulty recalling the investigation and asked to look at his notes. Jack objected.

F. Sue sought to have admitted into evidence Officer Jones' police report which contained a statement by Witness that Defendant was "speeding and not paying attention". Sue has been unable to locate Witness. Jack objected to the admission of the police report.

How should the Superior Court rule on each objection?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**FEBRUARY 28, 2008
AFTERNOON PAPER
QUESTIONS**

ESSAY SECTION

6. In 2002, Stan executed a will which contained a valid trust, naming Tim as trustee. The terms of the trust were as follows, namely:

- (a) All net income was paid to Bill, Stan's nephew and only survivor, for life;
- (b) Tim, as trustee, may invade the principal for Bill in such amounts as Tim, in his sole and reasonable discretion, determined;
- (c) The trust terminates on Bill's death and any remaining principal is to be distributed to Law School, from which Stan graduated; and
- (d) Bill's rights and interests under the trust are not transferable.

Stan died in 2004 and the trust was funded with one million dollars. Before he died, Stan helped out Bill with his expenses from time to time. Stan was concerned about Bill's ability to handle money prudently.

Bank obtained a judgment against Bill for an unpaid credit card bill that included charges for tuition, groceries, and stereo equipment. The credit card was "maxed out". Bank requested a court order that directed Tim to pay all future installments of trust income to Bank rather than Bill until the judgment was satisfied.

Bill was delinquent in making child support payments to Kate, his former girlfriend, for their child, May. Kate requested a court order that directed Tim to pay all future installments of trust income to her for child support rather than to Bill, until the arrearage for child support was paid.

Bill wants Tim to invade the trust principal so Bill can fund a new and highly speculative business venture, but Tim has refused. Bill requested a court order that directed Tim to invade the trust principal to fund the venture.

Because of Tim's refusal to invade the trust principal, and because Law School is concerned over Bill's debt difficulties, Bill and Law School want to terminate the trust in

order to divide the trust principal, but Tim has refused. Both Bill and Law School have requested a court order to terminate the trust.

What are the rights of the parties?

7. Due to the dramatic increases in gang violence and drug abuse in City, City's School Committee promulgated regulations for High School which stated in their entirety as follows:

"1. Gang-related activities such as display of colors, symbols, signals, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the School Committee for expulsion."

"2. Any assembly or public expression that advocates the use of drugs or other illegal substances is prohibited. Students in violation will be suspended from school and/or recommended to the School Committee for expulsion."

Susan, a student at High School, was stopped by High School's Principal, who asked Susan to come to Principal's office. There, Principal informed Susan that the small cross tattooed on her hand was a symbol used by the Blue Knight gang and that it violated the School Committee regulation. Susan, an honor student, explained to Principal that she was not a gang member, was unaware of the tattoo being a gang symbol and had chosen the tattoo simply because she liked its design. Later, after a further meeting with Susan and her parents, Principal wrote a letter to them, advising them that Susan was suspended for 10 days and further that when she returned to school, unless the tattoo had been removed or covered, a further suspension and/or recommendation to the School Committee for expulsion would be considered.

Ed, a student reporter for High School's newspaper, learned of Susan's suspension and wrote an article about gangs at High School in which he interviewed gang members about their activities, including incidents of gang violence and criminal activity. The newspaper was written and edited as a part of the curriculum for the senior journalism class at High School and, as was the practice at High School, Ed's article was submitted in advance of publication to Principal for review and approval. Concerned that Ed's article might encourage gang membership, Principal refused to allow Ed to publish the article.

William, also a student at High School and Susan's friend, became upset by Susan's suspension and the depressing atmosphere which he felt it had caused at High School. During a High School football rally held on the front lawn of High School, William, who stood across the street from High School with other students, held up a sign which read *'SMOKE WEED, BE HAPPY'*. Seeing the sign and understanding its reference to marijuana use, Principal crossed the street and told William to put the sign down. William refused to do so, and Principal confiscated the sign and informed William that he was suspended for a month.

What are the rights of Susan, Ed and William?

8. Teen was referred to Psychiatrist because of persistent depression. Although a talented musician, Teen frequently mentioned suicide and often said that he would be “better off dead.” Psychiatrist wrote a prescription for an anti-depressant for Teen but insisted that Sis, Teen’s older sister, keep custody of the medication.

Sis worked for Company as an accountant. Her job performance reviews were always excellent. Boss, her new supervisor, began to criticize her work, saying that “girls can’t do numbers” and offering to provide “extra instruction” for her after normal business hours. After several months of constant criticism and comments from Boss, Sis complained to Hilda, Company’s Human Resources Director. Sis said that not only was Boss’ criticism of her and her work unfair, he was also trying to get her to spy on other employees and had asked her to sign false statements about their job performance. Hilda told Sis that Boss was saying that Sis was incompetent and that Sis frequently appeared to be under the influence of “something.” Sis told Hilda that she needed to keep her job to provide health care for Teen. When Boss found out that Sis had spoken with Hilda, he ordered Sis to meet him at Company’s warehouse and that Sis was not to mention the meeting to anyone.

When Sis arrived, Boss told her that she was there for retraining and refused to allow her to leave the room or use her cell phone during a six hour period. Sis was given statements describing illegal conduct supposedly committed by Company employees and told that if she refused to sign the statements, she would not only lose her job but that Boss would make sure she never worked as an accountant again. Several times during the six hour period that Boss kept Sis in the meeting Teen called, leaving increasingly frantic messages for Sis to call him. Sis refused to sign the statements and, when Boss finally permitted Sis to leave, there was a voice mail on her cell phone that Teen had been taken to Hospital for a drug overdose.

When Sis arrived at Hospital, Teen was in intensive care. Teen had found the anti-depressant medication and had taken an overdose. Due to cutbacks in Hospital’s Emergency Room staffing, Teen was in a coma by the time he was seen. Hospital later claimed that Teen’s medical records and nursing notes for the first day of this emergency admission had been lost.

The next morning, Sis called to report that she could not come to work and Boss fired Sis. When Hilda went to Boss' office to discuss Sis' termination, Boss was not there but on his computer screen were the statements accusing other employees which Sis had refused to sign. Also, on Boss' computer screen was evidence of Boss' diversion of Company funds. Boss was fired but the documents Hilda saw on the computer screen were accidentally erased by Company. Teen lived but was never able to perform again as a musician.

What are the rights of the parties?

9. Big Corporation (“Big”) manufactured industrial lathes for factories. On February 1, 2007, Small Corporation (“Small”) agreed to purchase a lathe from Big for \$400,000 with a delivery date to Small no later than May 1, 2007. The parties agreed in their written sales contract that any delivery delay beyond May 1, 2007 would result in Big paying Small a penalty of \$15,000 per month of delay.

Due to overseas supply problems beyond Big’s control, Big realized by April 10, 2007 that it would not be able to deliver the lathe to Small until August 1, 2007. Thus, on April 10, 2007, Big’s President called Small’s Sales Manager on this delay, and Small’s Sales Manager voluntarily agreed to give Big until August 1, 2007 to deliver the lathe without any penalty. Small’s Sales Manager memorialized this extension in a short e-mail message to Big that day – “This will confirm that Big will have until August 1, 2007 to deliver the lathe to Small without incurring any penalty.”

On April 12, 2007, Small realized that it had paid too much for the lathe from Big. Small sent a letter to Big stating that Small was revoking its delivery extension, and that the lathe was due on the original delivery date of May 1, 2007.

Big delivered the lathe to Small on August 1, 2007, and refused to pay Small any late delivery penalty.

Ten days after Small received the lathe, the lathe malfunctioned and James, a Small employee working at the lathe, was badly hurt.

What are the rights of Big, Small and James?

10. Charlie worked at a warehouse which stored expensive electronic equipment. Charlie told Tom, a convicted felon, about the warehouse, its layout and the security guard's break schedule. Tom and Charlie agreed that Tom would "visit" the warehouse on Wednesday after closing to steal equipment and that they would split any stolen equipment equally.

Charlie then called Art. Art owed Charlie a lot of money that Art could not repay. Charlie told Art that he had an old score to settle with Tom and that he would forgive Art's entire debt if Art burned down the warehouse with Tom inside. Charlie also told Art that if he did not agree to do it, Charlie knew where to find him and his family.

Wednesday evening after the warehouse closed, Tom climbed onto the roof of the warehouse and entered through an open skylight. After Tom entered the building, he rushed down a stairway where he confronted Sam, the security guard, who was returning early from his break. Sam was so startled by Tom that he tripped and fell down the stairs seriously injuring himself. Tom did not expect anyone to be in the building. Tom tied Sam up, dragged him down a hallway and left him inside a locked closet.

Art, who had been waiting outside the warehouse, watched Tom enter the warehouse and then followed him inside. Once inside, Art poured gasoline in the warehouse and then tried to lock Tom inside. Before Art could lock the door, Tom realized what Art was doing and attacked Art, killing him. Tom then left the building without any electronic equipment. As he left, he threw a lit match on the gasoline to destroy any evidence. Sam died in the fire.

Charlie learned that Tom was still alive and, in fear of Tom, went to stay with his brother, Ed. After Charlie told Ed everything that had happened, Ed bought Charlie a plane ticket to another state.

What crimes, if any, have been committed and what defenses, if any, are available?